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In The

**Supreme Court of the United States**

**October Term, 1995**

**FRANCIS BERNARD AUER, et al.,**
Petitioners,

vs.

**DAVID A. ROBBINS, et al.,**
Respondents.

**On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

# BRIEF OF AMICUS CURIAE BROWARD COUNTY, FLORIDA IN SUPPORT OF RESPONDENTS

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**BRIEF OF AMICUS CURIAE**
**BROWARD COUNTY, FLORIDA,**
**IN SUPPORT OF RESPONDENT**

## STATEMENT OF INTEREST OF AMICUS CURIAE

Broward County, Florida, a political subdivision of the state of Florida, is a local government charged with the responsibility of providing for the welfare of its citizens. This responsibility includes the requirement that Broward County make appropriate determinations as to the manner of compensating its employees. This case will impact on Broward County's determinations regarding that matter.

Because this brief is being submitted by the authorized law officer of a political subdivision of a state, consent for its filing by the parties is not necessary. Rules of the Supreme Court of the United States, Rule 37.5

## SUMMARY OF ARGUMENT

The salary basis test for determining which employees are exempt from the Fair Labor Standards Act is not valid as applied to the public sector. Such a conclusion is consistent with legislative intent and accords the proper deference to the interpretation of the FLSA adopted by the Department of Labor. Moreover, the application of the test to the public sector would be inconsistent with the principles of public accountability and with prevailing public sector payroll practices that were developed in light of a historical backdrop that demonstrates the inapplicability of the test.

## ARGUMENT

### THE SALARY BASIS TEST FOR DETERMINING WHICH EMPLOYEES ARE EXEMPT FROM THE FAIR LABOR STANDARDS ACT IS NOT VALID AS APPLIED TO THE PUBLIC SECTOR.

This brief will address one aspect of the issues dealt with by the present case. Specifically, it will argue that the salary basis test for determining which employees are exempt from the Fair Labor Standards Act (FLSA) is not valid as applied to the public sector. Precisely such a conclusion was reached by the Ninth Circuit in its decision in *Service Employees International Union, Local 102 v. County of San Diego*, 60 F.3d 1346 (9th Cir. 1994). Agreeing with San Diego's contention that the test "is contrary to the FLSA and congressional intent," *id.* at 1351, the court in that case found that the test in existence prior to September 6, 1991, "was invalid in its entirety as applied to the public sector." *Id.* at 1353. Moreover, the Ninth Circuit is not alone in reaching this conclusion. *See Hilbert v. District of Columbia*, 23 F.3d 429, 434-436 (D.C. Cir. 1994), Henderson, J., concurring in part and dissenting in part; *McGarth v. City of Philadelphia*, 127 Lab.Cas. P 33,060, 1 Wage & Hour Cas.2d (BNA) 1500 (E.D. Pa. 1994); *Stewart v. City and County of San Francisco*, 834 F.Supp. 1233, 1238 (N.D. Cal. 1993). A look to the history of the FLSA and to the applicable legal principles demonstrates that the decision in *Service Employees* is well-founded.

A. The Origins of the Act. The FLSA was adopted in 1938 as a



remedial and humanitarian means of recovery from the Great Depression. It was "designed to provide a minimum standard of living necessary for the health, efficiency, and general well-being of workers, as well as to prescribe certain minimum standards of working conditions." *Brennan v. Wilson Building, Inc.*, 478 F.2d 1090, 1094 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973).

The FLSA contains three core provisions. It establishes a minimum wage, requires employers to pay overtime compensation to employees working over a specified number of hours in a week (usually 40), and contains provisions designed to eliminate child labor. 29 U.S.C. §§ 206-213. At the time of its passage, the Act explicitly excluded public employees from coverage. *See* 29 U.S.C. § 202; *United States v. Darby*, 312 U.S. 100 (1941).

From its inception, the FLSA has always exempted "executive, administrative and professional" employees from the overtime and minimum wage provisions of the Act. Instead of defining these terms, Congress delegated this role to the Secretary of Labor.[1]

The first regulations defining the section 13(a)(1) executive, administrative and professional exemptions (the so-called "white collar" exemption) were promulgated on October 20, 1938. 3 Fed. Reg. 2518. These regulations include a provision which survives in identical form today. It states as follows:

> In determining such future regulations separate treatment for different industries and for different classes of employees may be given consideration.

Thus, from its earliest pronouncements, the Department of Labor ("DOL" or "Department") recognized that proper implementation of the section 13(a)(1) exemptions might require it to draw dis-

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[1] Section 13(a)(1), 29 U.S.C. § 213(a)(1), states:
The provisions of sections 206 [wages] and 207 [hours] shall not apply with respect to . . . [a]ny employee employed in a bona fide executive, administrative, or professional capacity . . . (as such terms are defined and delimited from time to time by regulations of the Secretary . . . )

tinctions in the treatment accorded to employees working in different employment settings.

B. The Creation of the Salary Basis Test. In the 1940s and 1950s, the DOL adopted further regulations defining the white collar exemption. *See* 57 Fed. Reg. 37665 (August 19, 1992). These regulations -- which remain essentially unchanged today -- provide two different criteria to be used in determining whether an employee is properly classified as an executive, administrator or professional.

The first criteria, the "duties" test, mandates that an exempt employee must function in a supervisory role, or work in a field requiring the exercise of discretion, judgment, or talent. *See* 29 C.F.R. § 541.1(f), § 541.2(e) (2) and § 541.3(e).

The second criteria, the "salary test," is less widely utilized. It requires employees to receive more than $155 per week ($250 per week using the so-called "short test") and be paid "on a salary basis." *See id.*

Employees will be considered to be paid on a "salary basis" if they receive a "predetermined amount" each pay period, 29 C.F.R. §541.118, subject to certain criteria and exceptions.[2] "The aim of these restrictions is to determine whether an employee actually receives all compensation in the form of a salary or whether the employee is in fact compensated on a variable quantitative or qualitative basis." *Keller v. City of Columbus*, 778 F.Supp. 1480, 1485-86 (S.D. Ind. 1991).

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[2] In the relevant part, the § 541.118 (a) salary besis rule states as follows:

> An employee will be considered to be paid "on a salary basis" within the meaning of the regulations if under his employment agreement he regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of his compensation, which amount is not subject to reduction because of variations in the quality or quantity of the work performed. Subject to the exceptions provided below, the employee must receive his full salary of any week in which he performs any work without regard to the number of days or hours worked. This policy is also subject to the general rule that an employee need not be paid for any workweek in which he performs no work.



Section 541.118 does not permit an employer to reduce -- on either a daily or hourly basis -- the wages of a "salary basis" employee when there is no work available to be performed:

> An employee will not be considered to be paid "on a salary basis" if deductions from his predetermined compensation are made for absences occasioned by the employer or by the operating requirements of the business. Accordingly, if the employee is ready, willing, and able to work, deductions may not be made for time when work is not available.

29 C.F.R. § 541.118(a) (1).

While the primary focus of § 541.118 is on deductions caused by lack of work, the regulation also limits an employer's right to deduct pay from salaried employees who miss work for personal reasons. Under § 541.118(a)(2-4), employers may generally make deductions from an employee's salary for personal reasons, including sickness or disability, if these absences are "for a day or more." Conversely, if these personal absences are for less than a day, the regulations suggest (but do not state explicitly) that deductions are not permitted. 29 C.F.R. § 541.118(a); *see also Donovan v. Carls Drug Co., Inc.*, 703 F.2d 650, 652 (2d Cir. 1983) ("salaried professional employee may not be docked pay for fractions of a day of work missed").

C. Application of the Salary Test to Public Employment. The above-quoted DOL "salary test," first drafted in the 1940s, has remained in its present form since 1954 -- long before the FLSA became applicable to public employers. *See* 19 Fed. Reg. 4406 (July 17, 1954). The regulation was developed from 22 days of hearings and record evidence gathered by the DOL in 1947 from private employers. A DOL review of this regulatory history stated:

> These provisions were developed from extensive hearings and record evidence showing that executive, administrative, and professional employees employed in industries then-subject to the FLSA, *which excluded governmental employees*, were nearly universally paid on a salary basis.

57 Fed. Reg. 37665, 37666 (August 19, 1992) (emphasis added). Public employers did not participate in these hearings because the FLSA did not apply to public employment at the time. *Id.*

In 1974, the FLSA was extended to federal, state and local government employees. Pub. L. 93-259, 88 Stat. 55. This coverage was sharply curtailed, however, by this Court's 1976 decision declaring invalid the FLSA's application to state and local public employees "performing traditional government functions." *National League of Cities v. Usery*, 426 U.S. 833 (1976).

Public employees were again covered by the FLSA in 1985, when this court reversed *National League of Cities* in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985). In *Garcia*, this court reasoned that sufficient authority existed under the Commerce Clause to apply the FLSA to state and local governments and found that applying federal regulation based on a distinction between "traditional" and "nontraditional" governmental functions was unsound and unworkable. *Id.*

In response to *Garcia*, Congress amended the FLSA in November, 1985, to address the particular concerns of state and local governments and to provide relief from liability during a temporary adjustment period. 29 U.S.C. §§ 203(e), 207(o), 207(p); *see also* 57 Fed. Reg. at 37667. In Congress' rush to provide legislative relief, however, one problem that was not recognized was the effect that the DOL's "salary basis" regulation could have on public employers. *See* 57 Fed. Reg. at 37667. For many years prior to *Garcia*, most public employers had operated pay systems "premised on a concept derived from principles of public accountability that governmental employees should not be paid for time not worked due to the need to be accountable to the taxpayers for the expenditure of public funds." *Id.*

In the course of operating such payroll systems, local governments gave their employees accrued leave time, including sick and vacation pay, which the employees were then expected to use to cover various absences -- including absences of less than a day. Any employee, including high-ranking officials, who somehow managed to exhaust his or her leave time, or was absent without leave, was therefore at least theoretically subject to actual reductions in pay. *Id.*



Such reductions made for partial-day absences, however, while consistent with principles of public accountability, could arguably violate a strict, literal construction of § 541.118.

In late 1985, the Department of Labor became aware of this potential conflict between § 541.118 and prevailing public sector payroll practices. In response to a request for public comments, the DOL learned that the existing salary test had at least the potential to jeopardize the availability of the section 13(a) (1) white collar exemption in the public sector. 50 Fed. Reg. 47696 (November 19, 1985); *see also* 57 Fed. Reg. at 37667-68. However, while aware of this theoretical problem, the Department apparently concluded that other regulatory issues deserved more immediate attention. Accordingly, DOL deferred consideration of revisions to the salary test, noting instead that "the Department expects to publish a notice of proposed rulemaking concerning Part 541 during 1987." *Id., quoting* 51 Fed. Reg. 13402 (April 18, 1996).

Unfortunately, the DOL never followed through on its promised rulemaking.[3] Instead, the DOL simply published a letter ruling in 1987 stating (57 Fed. Reg. at 37668 (emphasis added)) that it would not enforce the salary test against public entities:

> It has come to [DOL's] attention that some State and local government jurisdictions have statutory provisions which prohibit any employee from being paid for time not actually worked, or not covered by annual, sick or other type of paid leave. Such statutory provisions conflict with the basis of payment described in § 541.118 of 29 CFR Part 541.

[3] DOL's inaction contrasts sharply with action taken by its counterpart -- the Office of Personnel Management ("OPM", formerly known as the Civil Service Commission) -- which is charged with administering the Act with respect to most federal employees. 29 U.S.C. § 204(f). After the FLSA was extended in 1974 to cover federal employment, OPM promptly issued white collar exemption regulations focusing entirely on the duties test and including *no salary basis requirement*. 40 Fed. Reg. 27640 (July 1, 1975); *see also* 57 Fed. Reg. at 37667. In the preamble to its regulations, OPM stated that its rulemaking was based upon a "policy of integrating exception criteria with Federal classification systems to the extent possible, while maintaining results consistent with the exemption criteria applied by the Department of Labor." *Id.* OPM's current regulations administering the FLSA similarly contain no salary basis test. 5 C.F.R. §§ 551.203; 551.204

> ... This practice is similar to the practice applicable to Federal employees. ... While consideration is given to proposed changes in the regulations, a *nonenforcement policy is being adopted with regard to the salary basis of payment for otherwise exempt public employees.* ... This nonenforcement policy is not intended to affect any employee's rights under Section 16(b) of the FLSA [private enforcement provisions].

However, while the DOL's statement precluded federal enforcement, it did nothing to stop "entrepreneurial" public employees from bringing their own salary basis lawsuits against their employers. As a result, dozens of private actions were initiated across the county to take advantage of this potential regulatory loophole. One such action was *Abshire v. County of Kern*, 908 F.2d 483 (9th Cir. 1990), in which the Ninth Circuit severely penalized a public employer for not meeting its broad interpretation of the § 541.118 salary basis rule.

In announcing that all partial-day payroll deductions were "antithetical to the concept of a salaried employee," the *Abshire* Court made no inquiry into whether its reading of the FLSA reflected the congressional intent underlying the Act.[4] If it had, it would have found that Congress expressly intended to preserve the white collar exemption for public sector employers when it extended coverage to the FLSA in 1974. The committee report accompanying the bill that became the 1974 FLSA amendments states:

> Section 6 of the bill extends minimum wage and overtime coverage to about 5 million *non-supervisory* employees in the public sector not ... [then] covered by the Act. ... The bill will provide that virtually *all non-supervisory government employees* will be covered. . . . By the same token, the committee intends to cover all employees (*except professional, executive, and administrative personnel who are exempted under section 13 of the law*) in all civilian branches of the Federal Government. [H.R. Rep. No. 93-913, p. 27 (1974); emphasis added.]

[4] Indeed, the court recognized as much in its subsequent discussion in *Service Employees*. 60 F.3d at 1354.



57 Fed. Reg. at 37667. Thus, in extending the FLSA to the public sector, Congress evidenced no desire to jeopardize the availability of the section 13(a)(1) white collar exemption to public employers, or to alter the compensations arrangements of public sector executives and other supervisory personnel.

After *Abshire*, the Department of Labor quickly recognized this underlying congressional intent and -- now facing a rulemaking "emergency" -- moved quickly to close the "salary basis" loophole. On September 6, 1991, the DOL promulgated an immediately effective Interim Final Rule, which provided that public sector employees would not lose their white collar exemption simply because they were paid in accordance with a compensation system requiring a payroll deduction for absences of less than one work day. 56 Fed. Reg. 45822. In finding that "few public employers compensate employees in a manner that meets the 'on a salary basis' requirement," the Department criticized *Abshire*, noting that it had exposed "government employers to potentially enormous and generally unexpected back wage liabilities to employees, some of whom would clearly be exempt if duties and amount of compensation alone were examined.[5] *Id.* at 45824-25.

Following a formal notice and comment period, the DOL on August 19, 1992 published its Final Rule on the public sector salary test. 57 Fed. Reg. 37665 (to be codified at 29 C.F.R. § 541.5d). Like the Interim Final Rule, the Final Rule provides that public sector employees who would otherwise be exempt from the FLSA's overtime requirements under section 13(a)(1) do not lose their exemption because their pay is subject to reduction for partial-day absences.

In issuing the Final Rule, the DOL emphasized that the amendment of its regulations was "necessary in order to give effect

[5] At the time it promulgated the Interim Final Rule, the DOL also proposed another regulation which would have "retroactively" restored the white collar exemption to public sector employees whose employers had reimbursed them for any partial-day pay deductions. (56 Fed. Reg. 45828) However, citing concerns over its authority to engage in retroactive rulemaking, the DOL later withdrew its proposed rule. 57 Fed. Reg. 37678. In withdrawing the proposal, the DOL stated its intent to seek retroactive relief for public employers through the legislative process. *Id.*

of the statutory exemption in the public sector as intended by Congress under the 1974 Amendments." *Id.* at 37673. In one of several passages emphasizing this point, the DOL stated as follows:

> [I]t is clear from a plain reading of FLSA's legislative history in 1974 [quoted in the committee report above] that Congress intended for the section 13(a) (1) exemption to be available for public sector employees. Congress was presumably unaware that ... many public sector compensation systems precluded payment for hours not worked ... . In light of the public accountability principles prevalent in public sector pay systems, the regulatory requirements adopted before Congress extended FLSA coverage to state and local governments simply could not operate in a manner that effectively distinguished exempt from non-exempt public employees. *The regulations were thus out of harmony with the intent of the statute* because State and local governments could not practically avail themselves of the exemption intended by Congress, *and thus were inappropriate as applied in the public sector.*

*Id.* at 37672 (emphasis added).

D. Deference to the Department's Interpretation of the FLSA. Given the broad discretion vested by Congress in the Secretary of Labor to "define" and "delimit" the FLSA, the Department's regulations are vested with "legislative effect." 29 U.S.C. § 213(a) (1); *Batterton v. Francis*, 432 U.S. 416, 428 (1977); *Building & Construction Trades Dept. AFL-CIO v. Donovan*, 712 F.2d 611, 616 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1069 (1984). Accordingly, this Court should not overrule DOL's interpretation of the section 13(a) (1) exemption unless the agency's definition is one "that bears no relationship to any recognized concept of the [statutory] program." *Id.*

The above-cited standard of review is very narrow: the Department's interpretative regulations may only be set aside if they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (a). Moreover, a "reviewing court is not entitled to substitute its judgment for that of the agency



... and must defer to the agency if its action has a rational basis in the record." *American Meat Institute v. United State Department of Agriculture*, 646 F.2d 125, 127 (4th Cir. 1981). *See also Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (courts must defer to agency's interpretation of statute unless that determination is unreasonable).

The previously cited cases that have found the salary basis test involved with regard to the public sector have applied this approach. In *Service Employees*, 60 F.3d at 1351, the court stated:

> The Administrative Procedure Act ("APA") reflects the familiar principle that courts reviewing agency action will "hold unlawful and set aside agency action, findings, and conclusions found to be ... arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2) (A). *In Chevron U.S.A., Inc. v. Natural Resources Defense Counsel*, 467 U.S. 837, 842-43 (1984), the Supreme Court further defined this test. It stated that if Congress has directly spoken to a precise question and that intent of Congress is clear, "the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* If the "statute is silent or ambiguous with respect to the particular issue, the question is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

*Service Employees* went on to find that Congress was silent as to whether the salary test applies to the public sector and that the question therefore became simply whether the agency's answer was based on a permissible construction of the FLSA. 60 F.3d at 1351.

In this instance, given the careful efforts made by the Department to document public sector payroll practices and examine prevailing public accountability principles -- and the Department's detailed findings concerning the legislative and regulatory intent behind section 13 (a) (1) and section 541.118 -- it cannot be reasonably argued that the Department lacked a "rational basis" for enacting the new public sector salary basis test codified in § 541.5d. Therefore, regardless of prior judicial interpretations of the which collar exemption, this Court should now give full force and effect to the

Department's new salary basis regulation and adopt the same rationale employed by the Ninth Circuit in *Service Employees*.[6]

The same result is also called for by this Court's long-standing "statutory intent" doctrine set forth in *Manhattan General Equipment Co. v. Commissioner of Internal Revenue*, 297 U.S. 129 (1936). In that case, this Court dealt with a situation in which the IRS enacted a new regulation when it found that a previous regulation was contrary to the intent of the underlying legislation. This Court applied the new regulation to a transaction that occurred during the lifetime of the old one, finding that the new regulation "became the primary and controlling rule" and that it "pointed the way, for the first time, for correctly applying the antecedent statute to a situation which arose under the statute." *Id.* at 135.

Here, as the Department has concluded, application of the pre-existing private sector salary basis test to public employment failed to take into consideration the special "public accountability" interests and practices of government employers.[7] Accordingly, this Court should now defer to the Department of Labor's August 1992 salary basis rule.

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[6] The fact that the Department offered a contrary interpretation as an amicus curiae in support of a petition for rehearing in *Service Employees* should not change this conclusion. As the Ninth Circuit concluded in rejecting the claim that deference should be given to this belatedly asserted position, the Department's "pre-September, 1991 'position' was not an engaged interpretation of the statute in light of Congressional intent." *Id.* at 1356. Instead, the Department "simply defaulted on its mandate to interpret the Fair Labor Standards Act and to recast the relevant regulations in the light of a sea change caused by the extension in 1985 and 1986 of the FLSA to nonfederal public employees." *Id.* As the court noted, the Department's nonenforcement policy was "tantamount to an admission by the DOL that the regulation in place, i.e, the salary test, was unsuitable as applied to public employees." *Id.* at 1357. Thus, the Department's position in *Service Employees* amounted to a request "to defer to the DOL's *failure* to discharge its responsibilities under the laws," *Id.* at 1359, an invitation that was properly declined by the court of appeals.

[7] The concept of public accountability permeates both the DOL actions and the cases discussed above. *See Service Employees*, 60 F.3d at 1352, n.2,, citing to *Hilbert*, 23 F.3d at 435, Henderson, J., concurring in part and dissenting in part ("Public accountability is the notion that 'government employees should not be paid for time not worked due to the need to be accountable to the taxpayers for expenditure of public funds.'")



## CONCLUSION

The salary basis test was never intended to apply to the public sector. The concept that it did was fostered by the belief that *Abshire* had reached such a conclusion. The decision in *Service Employees*, however, demonstrates both that the issue was never considered in *Abshire* and that the idea that the salary basis test does apply to the pubic sector is without merit. Broward County respectfully submits that the *Service Employees* is correct in both of these conclusions and that this Court should adopt the rationale of *Service Employees* and apply it to the facts of the present case.

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